VALIDITY OF A PARDON GRANTED BY THE LIEUTENANT GOVERNOR DURING THE ABSENCE OF THE GOVERNOR FROM THE STATE.—While the powers of the state governments, unlike those of the federal, are entirely residuary, the executive department of each has its constitutional limitations and provisions for the filling of vacancies both permanent and temporary. The constitutions of most states provide that in case the governor is impeached, dies, fails to qualify, resigns, removes from the state, or is unable to discharge the duties of the office, that the said office, with its compensation, shall devolve upon the lieutenant governor.[1] Under such a constitutional provision an unconditional pardon granted to one convicted of a crime and imprisoned therefor, by the lieutenant governor acting as governor at a time when the governor is temporarily absent from the state, is valid and effectual.[2] The meagre authority on the point which has recently been approved in *Ex parte Cullens* (Okla.) 150 Pac. 90, reaches this as a conclusion without assigning very satisfactory reasons for the decision.

As human actions are necessarily imperfect, sometimes the most unerring tribunals perpetrate a miscarriage of justice. Hence by constitutional provisions there is vested in the executive department, both state and federal, the very salutary and beneficent power to grant pardons. Such a power does not inhere in the person of the governor himself, but it is simply because the sole power is delegated to his office and he is the temporary holder thereof that resort is had to his official discretion alone. The vested right of the tenure of the term attaches to the person of the elected incumbent, but the functions of the office, in certain contingencies (in the instant case, his absence from the state), separate from him temporarily, and adhere to a distinct class of powers within its department for the use, benefit and protection of that great public for which the government was created.[3] With such a power inherently attached to the gubernatorial chair we are inevitably forced to the conclusion that it may be validly exercised by an incumbent of the office especially designated by the constitution for just such an exigency. The framers of the constitution could readily see that the state would need a chief executive at its head during the absence of the governor and made provision for the lieutenant governor to take the reigns of

[1] Ex parte Crump, 10 Okla. Cr. 133, 135 Pac. 428, 47 L. R. A. (N. S.) 1036, 1041; People *ex rel.* Robbins *v.* Hayes, 82 Misc. 165, 143 N. Y. Supp. 325; State *v.* Sadler, 23 Nev. 356, 47 Pac. 450; People *v.* Cornforth, 34 Colo. 107, 81 Pac. 871; State *v.* Stearns, 72 Minn. 200, 75 N. W. 210. In a few states the gubernatorial office devolves upon the president of the Senate. State *v.* Heller, 63 N. J. Law 105, 42 Atl. 155, 57 L. R. A. 312; Futrell *v.* Oldham, 107 Ark. 386, 155 S. W. 502; Attorney General *v.* Taggart, 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613. And in a still smaller number, upon the Secretary of State. *Re.* Moore, 4 Wyo. 98, 31 Pac. 980.

[2] Ex parte Crump, 10 Okla. Cr. 133, 135 Pac. 428, 47 L. R. A. (N. S.) 1036 and note. See also, Territory *v.* Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440, 15 Am. Cr. Rep. 552.

[3] See ex parte Crump, *supra.*

government. It is difficult to see upon what real grounds the validity of his official acts can be questioned. An appointment made by the lieutenant governor during the absence of the governor elect from the state is deemed binding. The court in *State* v. *Barrow*[4] said: "The case contemplated by the constitution had occurred, and whatever power could have been exercised by the governor had he been present, the same could have been lawfully exercised by the lieutenant governor in his absence." It is impossible sufficiently to differentiate between the two executive acts, appointment and pardon, so that upon impartial consideration one is valid and the other an ineffectual attempt to usurp governmental perrogatives.

Under constitutions providing that in case of a vacancy by resignation, death, etc., of the governor that the duties and powers of the office shall devolve upon the lieutenant governor or the president of the senate, as the case may be, even though such person does not succeed to the office itself but only has imposed upon him its duties and compensation, retaining his former official position,[5] yet one so invested with the gubernatorial power is entitled *de jure* to discharge the functions of the office and an appointment is effectual and must be respected by the secretary of state.[6]

State constitutions enumerate coördinately the circumstances of a permanent vacancy and of a temporary vacancy in the office of governor as proper cases for the exercise of the executive functions by the lieutenant governor. Suppose the governor should die, could a reasonable doubt exist in the mind of the most apprehensive that the office and its duties should devolve upon the lieutenant governor and that all his official acts were valid? The provision made for such a contingency has received no express adjudication, for the evident reason that the language is too clear and unmistakable and the intention too plain to admit of question. It would have been absurd not to have created this or any other office, subject to a temporary vacancy. It would have evidenced an excess and folly of reverence and staid respect of the man, without the consideration for the public interest, to be found in the utility and necessity of the functions of the office. Now as this equal enumeration of contingencies as provided by the constitution upon which the office of the chief executive or its duties, or both, shall devolve upon the lieutenant governor are *in pari materia*,[7] it is difficult to perceive an adequate reason why the lieutenant governor should have a better title to the office with the right of validly exercising its powers upon the happening of one contingency than the other.

There appears to be no direct decision on the point whether the lieutenant governor acting as governor in such a case is a *de jure* or merely a *de facto* officer. It would seem that

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[4] 29 La. Ann. 243.
[5] Futrell *v.* Oldham, *supra;* People *v.* Cornforth, *supra;* State *v.* Sadler, *supra;* State *v.* Heller, *supra.*
[6] State *v.* Hodges, 107 Ark. 401, 155 S. W. 508.
[7] Ex parte Crump, *supra.*

under a constitution providing that in certain conditions the office itself with its powers, duties and compensations, should devolve upon the lieutenant governor, that then such acting governor should be deemed a *de jure* officer. But when only the duties, powers, etc., of the office are to be assumed by the designated official upon the happening of a specified event, he still retaining his former position, then he should not be considered as a *de jure* governor, for in such a case he only exercises the powers and duties of the chief executive by virtue of his official position as lieutenant governor.[8] Should such an acting governor resign his official position he would thereby *ipso facto* cease to have authority to perform the duties and exercise the privileges and power of the chief executive.[9]

A *de jure* officer is entitled to the emoluments of the office, while the *de facto* officer has no claim thereto.[10] For the salary of an officer can be recovered on the strength of a title of a *de jure* officer, although he has not performed the duties of the office, and a *de facto* officer cannot recover the salary although his official acts are valid.[11] Now when the office of governor itself, not merely the authority to exercise its power and duties, devolves upon a designated official and he becomes governor, such acting governor is entitled to the compensation of the chief executive,[12] for, as contended above, he is governor *de jure*. However, when only the powers and duties devolve upon the named official, the governor is still entitled to the compensation of the office; while absent from the state he is denied the right to collect the compensation as such official, being apparently deemed a mere *de facto* officer.[13] Hence

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[8] People *v.* Cornforth, *supra;* State *v.* Heller, *supra:* In the latter case on page 110 of 63 N. J. Law, page 157 of 42 Atl. (57 L. R. A. 312), the court said: "It (New Jersey Constitution) declares that the powers, duties, and emoluments of the office (governor) shall devolve on the president of the Senate. It does not confer upon him the title of the office. The president of the Senate exercises the powers of the governor; the president of the Senate performs the duties of the governor; the president of the Senate receives the emoluments of the office. He is still president of the Senate, with the added duties required of the chief executive of the state imposed upon him. * * *. He retains his office of senator and as president of the Senate, and not as governor, he exercises the added powers and performs the superimposed duties."

[9] State *v.* Heller, *supra.*

[10] Coughlin *v.* McElroy, 47 Conn. 397, 50 Atl. 1025, 92 Am. St. Rep. 224; People *v.* Weber, 89 Ill. 348; Ronero *v.* U. S., 24 Ct. Cl. 331, 5 L. R. A. 69; *Contra,* Adams *v.* State Insane Asylum, 4 Ariz. 327, 40 Pac. 185.

[11] Ex parte Crump, *supra.* See, CONSTANTINEAU, DE FACTO DOCTRINE, §§ 220 and 236.

[12] Chadwick *v.* Earhart, 11 Ore. 389, 4 Pac. 1180; Chatterton *v.* Grant, 12 Wyo. 1, 73 Pac. 470; State *v.* La Grave, 23 Nev. 216, 45 Pac. 243, 35 L. R. A. 233. See also, State *v.* Cornforth, *supra.*

[13] State *v.* Graham, 26 La. Ann. 568, 21 Am. Rep. 551; State *v.* Walker, 78 Mo. 179. It must be noticed that both these cases were proceedings by mandamus by the governor for his salary as chief executive

if we accept the above line of reasoning it depends entirely upon the construction of the wording of the particular constitution whether one acting as governor during the absence of the governor elect shall be deemed a governor *de jure* or *de facto*. In either instance, however, his official acts should be given validity so far as they concern the public and third persons. Even in the cases where the acting governor is not a *de jure* officer, then that established principle of the *de facto* doctrine which imparts validity to the official acts of persons who, under color of right or authority, exercise lawfully existing offices of whatever nature, in which the public or third persons are interested,[14] should be sufficient to render effectual a pardon so granted. Such a doctrine is based upon a wise public policy established from governmental experience of long duration.

Just what circumstances must concur in order to constitute the acts of a public officer valid and effectual so far as concerns third persons, notwithstanding a fatal defect in the title by which he claims to hold the same, is often difficult to determine. The cases are far from clear as to what are the essential conditions in virtue of which public official acts are regarded as valid and binding, independently of rightful authority in the public officer from which they proceeded. To constitute one a *de facto* officer he must have a presumptive or an apparent right to exercise the functions of the office, with either the full and peaceable possession of the powers of such office, or reasonable color of title together with actual user of the office.[15] These cases evidently cover all contingencies likely to arise. But where the lieutenant governor succeeds to the gubernatorial chair by a constitutional provision during the absence of the governor elect from the state, all the requirements of both the above are entirely satisfied.

It would be utterly unreasonable to require of the public and third persons that they inquire into the title of the officers with whom they purpose to deal to determine whether reliance can be placed in their assumed authority, as such would produce the intolerable condition of making the validity of their official acts dependent on their official titles. The doctrine is necessary to preserve peace and order in society and maintain the supremacy of the law.[16] Any uncertainty as to the duty of the citizens to obey the chief executive would tend to breed public disorder. If, however, obedience to the chief magistrate is required whenever he is found fully and peaceably possessed of the powers of his office, the situation is at once comprehensible and the reason apparent. On the other

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while absent from the state and as to all else the language of the court is mere *dicta*. Clearly the decisions are not authority in support of the collateral attack on the official acts of the *de facto* governor.

[14] See, CONSTANTINEAU, DE FACTO DOCTRINE, § 1.

[15] Ex parte Norris, 8 S. C. (8 Rich.) 408, 473.

[16] Scadding *v.* Lorant, 3 H. L. Cas. 418, 5 Eng. L. Eq. 16; Norton *v.* Shelby County, 118 U. S. 425.

hand, if such duty is restricted to the cases where such officer has color of title, uncertainty and confusion necessarily arise as to what constitutes color and what is the measure of sufficiency as applied to mere color of right.[17] The result of the authorities is that where the official is in possession of the office, and is executing its powers under color of title, he will be regarded at least as a *de facto* officer, and as to the public his official acts will be efficacious and can not be collaterally attacked.[18]

As absolute immunity from all danger and inconvenience is unattainable in human affairs, it is necessary that the duties of the officer follow the vicissitudes of the incumbency as provided by the constitution, and that as a matter of public policy any exercise thereof concerning third persons be given validity.

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[17] Ex parte Norris, *supra.*
[18] State *v.* Heller, *supra;* Ex parte Ward, 173 U. S. 452.